

THE REGISTRATION OF CIVIL PARTNERSHIPS SAME SEX MARRIAGE



Annex E: RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

Equality Network

Title Mr Ms Mrs Miss Dr *Please tick as appropriate*

Surname

Hopkins

Forename

Tim

2. Postal Address

30 Bernard St

Edinburgh

Postcode EH6 6PR

Phone 0131 467 6039

Email tim@equality-network.org

3. Permissions - I am responding as...

Individual

/

Group/Organisation

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate Yes No

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

Yes

No

CONSULTATION QUESTIONS

The registration of civil partnerships

Question 1 (Paragraphs 2.12 and 2.13)

Do you agree that legislation should be changed so that civil partnerships could be registered through religious ceremonies?

Yes

No

Don't know

Please give reasons for your answer.

Comments

The Equality Network is a national organisation working for equality and human rights for lesbian, gay, bisexual and transgender (LGBT) people in Scotland. We welcome the opportunity to respond to this consultation.

In late 2009 / early 2010, the Equality Network conducted a detailed survey of LGBT people's views on civil partnership and marriage. 427 LGBT people responded, making this by far the largest detailed survey on these issues conducted in Scotland.

In that survey, 85% of LGBT respondents said that marriage should be available to all couples (same-sex and mixed-sex). Only 9% said that the current segregated system (that is, marriage for mixed-sex couples and civil partnership for same-sex couples) would be fine if a civil partnership could be registered in a ceremony done by a religious or humanist leader. Allowing civil partnerships to be registered in religious ceremonies would clearly not in itself deliver equality for LGBT people.

In support of the Scottish Government's consultation on these issues, we held five consultation meetings during November 2011, in Dumfries, Dundee, Edinburgh, Glasgow and Inverness. All of the 150 participants at those meetings strongly agreed that the introduction of religious civil partnership ceremonies is not an appropriate alternative option to the introduction of same-sex marriage. The introduction of same-sex marriage is necessary to deliver fair and equal treatment for LGBT people. Assuming that same-sex marriage is introduced and that civil partnership is retained, there was a range of views at those meetings about whether religious ceremonies should be allowed for civil partnerships.

The Equality Network believes that same-sex marriage should be introduced and that civil partnership should be retained. If that happens, we consider that legally effective religious and humanist civil partnership

ceremonies should be available from those organisations and their celebrants who are willing to conduct them.

Our reasons are:

1. There may be a minority of same-sex couples who would wish to register their partnership in a religious ceremony, but who would prefer their partnership registered as a civil partnership rather than a marriage. For example one of them may have been married before and may consider that to be a commitment that endures for their lifetime. Or the couple may hold a religious view that marriage is for mixed-sex couples only.
2. There may be some religious organisations which would be prepared to conduct religious civil partnership ceremonies but not willing to conduct marriages, for example because their doctrine specifies that marriage is for mixed-sex couples only.

Question 2 (Paragraphs 2.14 to 2.19)

Do you think that the proposals in England and Wales on registration of civil partnerships in religious premises would be appropriate for Scotland?

Yes
No
Don't know

If you have answered no, please explain what elements of the proposals in England and Wales you consider inappropriate for Scotland.

Comments

The UK Government's stated policy aim for the recent new arrangements for civil partnership registration in England and Wales is "to enable secular civil partnership registrations to be conducted on religious premises that have been approved for the purpose" ['Civil partnership in religious premises consultation response', UK Government Equalities Office, Nov 2011]. We think this is something of an oxymoron. Arguably, there cannot be a fully secular ceremony on religious premises. Registrars in Scotland do not conduct ceremonies on religious premises, and in our view that should not change.

We believe that same-sex couples who would wish for a religious civil partnership ceremony would want a single integrated ceremony conducted by the religious celebrant, not a dual ceremony with a religious part and a secular part, potentially conducted by two different people, albeit on the same religious premises, as is required under the new England and Wales

legislation.

The appropriate solution for the provision of religious civil partnership ceremonies in Scotland would therefore be to approve the religious celebrant to “solemnise” the civil partnership, sign the civil partnership schedule and return it to the registrar – arrangements similar to those for religious marriage registration.

Question 3 (Paragraphs 2.20 to 2.24)

Do you agree with allowing religious celebrants to register civil partnerships in religious premises?

Yes
No
Don't know

Please give reasons for your answer

Comments

For the reasons stated above, we believe that this is the appropriate approach in Scotland to allowing religious civil partnership ceremonies. The legal arrangements for this should parallel the arrangements for religious marriage solemnisation.

Question 4 (Paragraphs 2.20 to 2.24)

Do you agree with allowing religious celebrants to register civil partnerships in other places agreed between the celebrant and the couple?

Yes
No
Don't know

Please give reasons for your answer

Comments

In order to maximise choice and to simplify matters by keeping the arrangements for religious civil partnership ceremonies in line with those for religious marriages, religious celebrants should have the same freedom to choose the place of registration, in agreement with the couple, as they currently have to choose the place of religious marriage solemnisation.

Question 5 (Paragraph 2.25)

Do you agree that religious bodies should not be required to register civil partnerships?

Yes

No

Don't know

Please give reasons for your answer

Comments

We have not consulted with LGBT people on the specific issue of whether religious bodies should be required to register civil partnerships. The results of our consultation on whether religious bodies should be required to solemnise same-sex marriages are described at question 14 below.

The Equality Network believes that each religious body should be free to decide for itself whether or not to conduct religious civil partnership ceremonies.

We regret that some religious bodies will decide not to allow their celebrants to conduct either same-sex marriages or religious civil partnerships, but that is a decision for them.

We think that it is possible that some religious bodies may be willing to conduct same-sex marriages, but may not wish to conduct religious civil partnerships, and that some may be willing to conduct religious civil partnerships, but not same-sex marriages.

Question 6 (Paragraphs 2.26 and 2.27)

Do you consider that religious celebrants should not be allowed to register civil partnerships if their religious body has decided against registering civil partnerships?

Yes

No

Don't know

Please give reasons for your answer

Comments

We recognise that some religious bodies have expressed concerns about potential external or internal pressure to conduct same-sex ceremonies. For

similar reasons to those set out in our answer to question 14 below, we believe that concerns about legal action forcing religious bodies or celebrants to conduct same-sex ceremonies are misplaced. However we recognise that differences of opinion on civil partnership amongst members of religious bodies may result in stresses within those bodies. Religious bodies may therefore prefer that the law puts in place a mechanism that ensures that individual celebrants may not register civil partnerships without their religious body's approval.

In doing so, the law would in effect put in place a "double lock", whereby both the religious body, and the individual celebrant, must say yes, before the celebrant can be approved by the General Register Office for Scotland to conduct civil partnership ceremonies. This would help reinforce the certainty that no religious body or celebrant will be required to conduct civil partnership ceremonies unless they agree to.

Question 7 (Paragraphs 2.28 to 2.30)

Do you agree that individual religious celebrants should not be required to register civil partnerships?

Yes
No
Don't know

Please give reasons for your answer

Comments

Our view is that it is unlikely that any religious body would wish to require a celebrant to conduct civil partnerships against the celebrant's will. However, we would be content for the legislation to make provision requiring the individual celebrant's agreement, before the celebrant is approved to conduct civil partnerships – this would implement the double lock referred to in our comments on question 6.

Question 8 (Paragraphs 2.31 to 2.35)

Which of the options do you favour to ensure that religious bodies and celebrants do not have to register civil partnerships against their will?

Do you favour:

Option 1
Option 2

Neither

If you have another option, please describe it.

Comments

Our view is that option 1 would in principle be more in line with the spirit of equality. It would mean that, in the specific law on approving celebrants, no distinction would be made between marriage and civil partnership. However, it is quite clear that in practice a significant number of religious marriage celebrants, including for example all Catholic priests, will not be carrying out civil partnership ceremonies. In such circumstances, it does not seem unreasonable to operate a system of separate approvals for celebrants to solemnise mixed-sex marriages and to conduct civil partnership ceremonies.

Option 1 leaves the implementation of the rule discussed in question 6 above (preventing individual celebrants from acting contrary to the decision of their religious body) entirely to the internal discipline of religious bodies. We appreciate that some religious bodies may prefer the law to include procedures which reinforce the certainty that the religious body will not be required to conduct civil partnerships and will be able to prevent its celebrants from doing so. Option 2 would do that, and we would be content with that option.

See our answer to question 14 below for our views on the importance of the Equality Act 2010 and the European Convention on Human Rights in ensuring that religious bodies and celebrants cannot be challenged under equality law for refusing to register civil partnerships.

Question 9 (Paragraphs 2.36 to 2.40)

Religious bodies may not wish their premises to be used to register civil partnerships. Do you agree that no legislative provision is required to ensure religious premises cannot be used against the wishes of the relevant religious body?

Yes

No

Don't know

Please give reasons for your answer

Comments

We feel that it may be difficult to legislate for every case, when there may be many different models for sharing of premises between religious groups,

and with non-religious groups. We note that where a religious body uses, for example, a village hall for worship, and that hall is otherwise used mostly for non-religious purposes, the hall can already lawfully be used for civil partnership ceremonies conducted by the district registrar.

We therefore do not think that wholly new issues arise about the sharing of premises, if religious civil partnership ceremonies are allowed. We would expect the bodies that share premises, including the owner of the premises, to reach agreement about the appropriate use of the premises for either non-religious or religious civil partnership ceremonies.

Same sex marriage

Question 10 (Paragraphs 3.11 and 3.12)

Do you agree that the law in Scotland should be changed to allow same sex marriage?

Yes
No
Don't know

Please give reasons for your answer

Comments

The Equality Network is strongly of the opinion that the law should allow same-sex marriages, and, more generally, that marriage should be available to couples regardless of their genders.

In our 2009/10 survey of 427 LGBT people, 85% said that this change is needed. 53% said that implementing this change is a high priority, and a further 32% said that it is a priority. From more informal qualitative consultation, we believe that, if anything, those figures underestimate the proportion of LGBT people who consider that this change is required. At our five same-sex marriage consultation events around the country in November 2011, every one of the 150 people present agreed that same-sex marriage should be introduced.

In our survey and our consultation events we asked people why marriage should be opened up to same-sex couples. People gave a range of reasons, with the following main themes:

Segregation is not equality

Even though the legal rights and responsibilities of civil partnership and marriage are almost identical, the two are not perceived as of equal status and value. Civil partnership is seen as a legal contract, while marriage is seen as the gold standard for celebrating the joy of love and commitment. Marriage is universally understood for its symbolism and its personal, community, and in some cases, religious significance. No one proposes to their partner by asking "Will you civil partner me?" – civil partnership just does not have the same meaning.

Civil partnership was invented specifically to deny same-sex couples access to marriage, and is seen by many same-sex couples as a second-class status.

Put simply, equality means making the same choices available to all. If mixed-race couples were denied the opportunity to marry, and instead offered civil partnership with the same legal effects, that would readily be

seen as unacceptable racist discrimination. The ban on same-sex couples marrying is equally unacceptable.

In 2008, the Connecticut Supreme Court considered whether that state's introduction of civil unions (a civil partnership type status for same-sex couples with identical state-level legal effects to marriage) was consistent with the state constitutional equality guarantee. The Court concluded, "in the light of the history of pernicious discrimination faced by gay men and lesbians, and because the institution of marriage carries with it a status and significance that the newly created classification of civil unions does not embody, the segregation of heterosexual and homosexual couples into separate institutions constitutes a cognizable harm." The Court ordered that marriage itself be opened up to same-sex couples.

The unfair and arbitrary nature of the current law is particularly clear when considering the situation of bisexual people. A bisexual person may fall in love with someone of the same gender or of the opposite gender – apart from the gender of the person, there is no difference in the relationship. The law directs the person to civil partnership or to marriage, with no choice, depending only on the gender of their partner.

Reducing discrimination and its effects

Although the legal effects of marriage and civil partnership are almost identical, in our 2009/10 survey, of 103 people in civil partnerships, 58% said they had not been given the same rights and respect that a married couple would get. That rose to 64% for women civil partners. Examples included people being referred to as "not really married"; banks not understanding why civil partners wanted a joint account; employers refusing to change Miss to Mrs on documentation; hospitals refusing to recognise the civil partner as next of kin; forms not including civil partnership status options alongside marital status.

These kinds of discrimination and less favourable treatment are in part due to an ignorance of what civil partnership is, and are in part due to prejudice for which the separate status of civil partnership provides an excuse.

The introduction of same-sex marriage would not eliminate this discrimination against same-sex married couples, but it would remove the problem of ignorance, and remove one of the excuses for prejudice.

Furthermore, the segregated status of civil partnership, including the separate terminology, in itself defines same-sex couples as "other", and thereby promotes stigmatisation, prejudice and discrimination against LGBT people. This includes homophobia, biphobia and transphobia in forms including bullying and hate crime. The introduction of same-sex marriage would help reduce these forms of prejudice against LGBT people because it would eliminate the official "otherness" status of LGBT people. It would also help to reduce prejudice and discrimination more widely, because it would be a clear public demonstration of Scotland's refusal to accept

discrimination, and Scotland's embrace of diversity, equality and freedom.

By reducing prejudice and discrimination, the introduction of same-sex marriage will enhance the safety, self-esteem, health and wellbeing of LGBT people in Scotland.

Discrimination against same-sex couples also affects their children. We estimate from our surveys that around 20% of same-sex couples have children, whether from a previous mixed-sex relationship, through adoption, or through assisted conception. Contrary to oft-repeated claims, research shows that children do as well with two parents of the same sex as with two parents of opposite sex ['How does the gender of parents matter?', Biblarz and Stacey, Journal of Marriage and Family, Feb 2010].

The introduction of same-sex marriage will benefit the children of same-sex couples by reducing prejudice in the ways described above.

Discrimination in the law

Although the domestic legal effects of civil partnership and marriage are almost identical, there is a significant difference in terms of international recognition. A Scottish same-sex marriage would be recognised in any other country which allowed same-sex marriage, because of the well established international law framework for recognising marriage. That is not the case for international recognition of civil partnership, which is more confused and irregular.

A specific form of legal discrimination caused by the ban on same-sex marriage is discrimination against married transsexual people in the provision of legal gender recognition. This is dealt with in our answer to question 20 below.

Freedom of religion and belief

Same sex couples cannot have their legal relationship solemnised by a humanist or religious celebrant. In our 2009/10 survey of 429 LGBT people, 22% said that they would consider a humanist marriage if it was available, and 22% said that they would consider a religious marriage.

Celebrants of the Humanist Society of Scotland solemnise marriages (under the religious marriage law) and very much want to be able to solemnise same-sex marriage.

The Unitarians, Quakers, Metropolitan Community Church, Liberal Jewish community and Pagan Federation of Scotland also solemnise marriages and want to solemnise same-sex marriages.

Freedom of religion and belief means respecting the right of those bodies that wish to solemnise same-sex marriages, and the right of those couples who wish a religious same-sex marriage to be solemnised by those bodies.

It also means respecting the right of religious bodies that disagree with same-sex marriage to decline to conduct them.

Neither set of religious bodies (those that agree, and those that disagree with same-sex marriage) has the right to impose their views about this issue on the other set. Marriage is not owned by any religious body (and in fact predates any current religious faith), and no religious body should have a veto over the arrangements for marriage.

Wider effects of same-sex marriage

Civil partnerships are currently running at about 2% of the rate of (non-tourist) marriages in Scotland – approximately 500 civil partnerships per year now; and 3500 in total. The future number of same-sex marriages could be a little higher because of greater demand. The introduction of same-sex marriage will have no effect on the existing or future marriage of any mixed-sex couple – there is not a finite limited number of marriages available. Rather it could be argued that introducing same-sex marriage would strengthen the institution of marriage, by enriching it, and demonstrating that it is a modern, relevant and equitable institution, desired and valued across Scotland's diverse population.

The introduction of same-sex marriage will be in line with Scotland's ideals of equality, diversity, tolerance, respect, freedom, dignity and fairness. By publicly embodying those values, the introduction of same-sex marriage will also further strengthen those values in Scottish society.

The legal definition and effects of marriage have changed enormously over the past couple of hundred years, up to and including the major changes to divorce law in the Family Law (Scotland) Act 2006. The introduction of same-sex marriage, in contrast, will not change at all the law applying to mixed-sex marriages, and is therefore a minor alteration compared to what has gone before.

Public opinion

The 2010 Scottish Social Attitudes Survey asked "Do you agree or disagree that gay and lesbian couples should be allowed to marry?" 61% agreed, while only 19% disagreed. Survey respondents were asked their religious denomination, so the results may be analysed by religious denomination. 54% of Catholics agreed with same-sex marriage, with 21% disagreeing; 50% of Presbyterians agreed, with 25% disagreeing. Amongst those of no religion, 72% agreed with same-sex marriage and 12% disagreed.

Support for same-sex marriage is particularly strong amongst younger people, with 77% of under 25s in support as long ago as 2006 (24% more than the population as a whole). The introduction of same-sex marriage has particular resonance for young people, who see it as being about Scotland

looking forward as a modern 21st century country.

Not surprisingly, given public opinion, there is wide support across political parties for introducing same-sex marriage. The Scottish Liberal Democrats and Scottish Green Party included a pledge to introduce same-sex marriage in their 2011 Holyrood manifestos. The SNP and Labour Party included a pledge to consult on the issue.

International context

Seven western European countries surrounding us have already introduced same-sex marriage: Iceland, Norway, Sweden, the Netherlands, Belgium, Spain and Portugal. Needless to say, there is no evidence from any of those countries of any of the negative consequences that some of the opponents of same-sex marriage suggest would follow [see 'When gay people get married', MV Lee Badgett, New York University Press 2009]. The government of Denmark has announced a government bill to introduce same-sex marriage. Scotland is being left behind on this key equality issue.

Canada, South Africa, Argentina, Mexico, and a number of US states have also introduced same-sex marriage, and the issue is under active consideration in other countries such as Australia, Brazil and Nepal.

Scotland's international reputation with key partners will be enhanced by the introduction of same-sex marriage. Scotland (and the UK) seek to promote equality and human rights internationally, and to do this effectively we need to ensure full respect for equality and human rights at home.

This change is one whose time has come – future generations will look back with surprise that the law ever prevented same-sex couples from marrying.

Question 11 (Paragraph 3.13)

Do you agree that religious bodies and celebrants should not be required to solemnise same sex marriage?

- Yes
No
Don't know

Please give reasons for your answer

Comments

We have always believed, and continue to believe, that each religious body

should be free to decide for itself whether or not to conduct same-sex marriages.

We regret that some religious bodies will decide not to conduct same-sex marriages, but that is a decision for them. It would be wrong, as well as futile, for the law to seek to impose this on any religious body.

We welcome that a number of religious bodies, with celebrants approved to solemnise marriages, have already made clear that they wish to conduct same-sex marriages, including the Unitarians, the Metropolitan Community Church, the Quakers, the Liberal Jewish community, and the Pagan Federation of Scotland.

We note that within the Church of Scotland there are internal and developing processes of discussion and eventual decision around issues relating to same-sex couples, with a Theological Commission due to report in 2013. The 2010 Social Attitudes Survey found that 50% of Presbyterians agreed with same-sex marriage, with 25% disagreeing. There is also discussion within the Scottish Episcopal Church. The law on same-sex marriage therefore needs to be flexible enough that religious bodies can “opt in”, if and when they decide to do so at a later date.

See also our answer to question 14 below.

Question 12 (Paragraphs 3.14 to 3.18)

Do you agree with the introduction of same-sex **civil** marriage only?

Yes
No
Don't know

Please give reasons for your answer

Comments

We note that just over half of marriages conducted in Scotland are civil. The remainder are religious (42%) or humanist (7%). In our 2009/10 survey of 427 LGBT people, we asked, if marriage and civil partnership were both available for same-sex couples, whether survey respondents would consider a civil partnership, a civil marriage, a humanist marriage or a religious marriage ceremony, in the future. 22% said that they would consider a religious marriage. The number who said that they would consider a humanist marriage was also 22%. There is clearly therefore a significant demand amongst LGBT people for same-sex religious or humanist marriage.

At our five consultation events across Scotland in November 2011, the 150 people present unanimously supported the introduction of same-sex

marriage both civil and religious.

Those LGBT people who are interested in a religious marriage cited as reasons their faith, freedom of religion, and fair access to traditional forms of marriage. LGBT people of faith asked why they could not have a marriage before God. Others noted that many mixed-sex couples choose a religious marriage more for reasons of tradition than for reasons of faith – why should this choice not also be available to same-sex couples?

As noted in our answer to question 11, there are a number of religious bodies with celebrants approved to solemnise marriages, who already wish to solemnise same-sex marriages.

The introduction of civil only same-sex marriage would deny those bodies the freedom to choose to conduct same-sex marriages, and would deny the very significant proportion (22% in our survey) of LGBT people who would want a religious marriage that opportunity.

Furthermore, introducing civil only same-sex marriage would deny the Humanist Society of Scotland (HSS) the freedom to carry out same-sex marriages, because it does so under the religious marriage provisions of the Marriage (Scotland) Act 1977. The HSS strongly wish to solemnise same-sex marriages, and a very significant proportion of LGBT people (22% in our survey) say they would like the opportunity for a humanist same-sex marriage ceremony.

We believe that if same-sex marriage is introduced, the principle of religious freedom requires that those religious (and humanist) bodies that wish to solemnise same-sex marriages should be able to do so, while those that do not should be free not to. Neither set of religious bodies should impose its views on the other set.

Changing the law to introduce civil only same-sex marriage would not introduce true equality of treatment under the law, for same-sex and mixed-sex couples. It would therefore tend to undermine some the wider benefits of equality referred to in our answer to question 10 above. The campaign for equality would need to continue until the freedom to solemnise same-sex marriages, for those religious and humanist bodies that wish to do so, was established.

Question 13 (Paragraph 3.19)

Do you agree with the introduction of same-sex marriage, **both** religious and civil?

- Yes
- No
- Don't know

Please give reasons for your answer

Comments

For the reasons given immediately above, this is the option that delivers equality under the law for same-sex couples, as well as freedom of religious expression, so long as the legal provisions ensure that no religious body shall be required to solemnise same-sex marriages.

We welcome that a number of religious bodies with celebrants approved to solemnise marriages, have already made clear that they wish to conduct same-sex marriages, including the Unitarians, the Metropolitan Community Church, the Quakers, the Liberal Jewish community, and the Pagan Federation of Scotland.

The Humanist Society of Scotland (HSS) conducts marriages under the legal provisions for religious marriage. The HSS conducts 7% of all marriages – more than any religious body except the Church of Scotland. The HSS strongly supports same-sex marriage and wishes to be able to solemnise same-sex marriages.

Question 14 (Paragraphs 3.23 and 3.24)

Do you agree that religious bodies should not be required to solemnise same sex marriage?

Yes
No
Don't know

Please give reasons for your answer

Comments

The view of most of the 150 participants in our five consultation meetings around the country in November 2011 was that religious bodies should not be required to solemnise same-sex marriages.

Views expressed included that “faiths have their key tenets; we shouldn't change them even if we don't like them” and “I wouldn't want them to conduct my marriage if they didn't want to”.

Nevertheless, it was noted by participants that those religious bodies which refuse to conduct same-sex marriages are adopting a position of deliberate discrimination against LGBT people, and participants viewed this as a matter for disappointment and concern. It was noted that religious bodies would not (and could not lawfully) discriminate in this way on grounds of race. However, religious bodies can lawfully discriminate in this way on grounds of sexual orientation (see below).

The Equality Network has always believed, and continues to believe, that each religious body should be free to decide for itself whether or not to solemnise same-sex marriages. We regret that some religious bodies will decide not to do so, but that is a decision for them. It would be wrong, as well as futile, for the law to seek to impose this on any religious body.

As noted in our answer to question 13, we welcome that a number of religious bodies which have celebrants approved to solemnise marriages have already made clear that they wish to conduct same-sex marriages.

We note that, amongst the larger churches, within the Church of Scotland and the Scottish Episcopal Church there are internal and developing processes of discussion and eventual decision around issues relating to same-sex couples. The law on same-sex marriage therefore needs to be flexible enough that religious bodies can “opt in” if and when they decide to do so.

We note the concerns that have been raised by some religious bodies that equality (anti-discrimination) law might be invoked to require them to solemnise same-sex marriages. We strongly believe that these concerns are misplaced. Paragraph 2 of schedule 23 to the Equality Act 2010 provides that religious bodies may lawfully restrict participation in their activities (which includes their provision of marriage), on grounds of sexual orientation. Such a restriction is allowed if it is necessary to comply with the religious body’s doctrine, or to avoid conflict with strongly held religious convictions of a significant number of the religion’s followers. Paragraphs 2(4) and (5) apply the same rule to religious celebrants and others acting on behalf of the religious body. It is therefore clear that religious bodies and their celebrants cannot be successfully challenged under the Equality Act, for refusing to solemnise same-sex marriages.

We also believe that the guarantee of freedom to manifest one’s religion or belief in worship, teaching, practice and observance, in article 9 of the European Convention on Human Rights, underpins the right of religious bodies to refuse to conduct same-sex marriages. We note that in ten years of same-sex marriage in other European countries, there has never been any requirement on any religious body which disagrees with same-sex marriages to solemnise them.

In summary, the right of religious bodies to refuse to solemnise same-sex marriages is guaranteed by the promises of the Scottish and UK Governments and the commitments of the members of the corresponding Parliaments, by UK equality law, and by international human rights law.

Paragraph 25 of schedule 3 to the Equality Act 2010 contains provisions that any religious celebrant may refuse to marry a person who the celebrant reasonably believes has obtained gender recognition (that is, who is transsexual and has changed legal gender), without contravening the law against gender reassignment discrimination. Although for the reasons set

out in the preceding paragraphs it is not needed, we would be content for the Scottish Government to ask the UK Government to insert a similar provision into the Equality Act, which would state for the avoidance of doubt that no religious body or celebrant would breach the law against sexual orientation discrimination, for refusing to marry a couple because they are of the same sex. However, it is important that such an amendment to the Act be made in a timely manner, so that the introduction of same-sex marriage in Scotland is not delayed. The amendment might be made by the UK Government by statutory instrument, under the power in section 104 of the Scotland Act 1998.

Question 15 (Paragraphs 3.25 and 3.26)

Do you consider that religious celebrants should not be allowed to solemnise same sex marriages if their religious body has decided against solemnising same sex marriage?

Yes
No
Don't know

Please give reasons for your answer

Comments

We recognise that some religious bodies have expressed concerns about potential external or internal pressure to solemnise same-sex marriages. For the reasons set out in our comments on question 14, we believe that concerns about legal action forcing religious bodies or celebrants to solemnise same-sex marriages are misplaced. However we recognise that differences of opinion on same-sex marriage amongst members of religious bodies may result in stresses within those bodies. Religious bodies may therefore prefer that the law puts in place a mechanism that ensures that individual celebrants may not solemnise same-sex marriages without their religious body's approval.

In doing so, the law would in effect put in place a "double lock", whereby both the religious body, and the individual celebrant, must say yes, before the celebrant can be approved by the General Register Office for Scotland to solemnise same-sex marriages. This would help reinforce the certainty that no religious body or celebrant will be required to solemnise same-sex marriage unless they agree to.

Question 16 (Paragraphs 3.27 and 3.28)

Do you agree that individual religious celebrants should not be required to solemnise same sex marriage?

- Yes
No
Don't know

Please give reasons for your answer

Comments

The view of the majority of the 150 participants in our five consultation meetings around the country in November 2011 was that religious celebrants should not be required to solemnise same-sex marriages. They felt that if a religious body agrees to solemnise same-sex marriages, the body should give individual celebrants the choice of whether to participate. It was noted that ministers already have discretion about who they agree to marry. However, a significant minority of participants felt that if a religious body agreed to solemnise same-sex marriages, then individual celebrants of that body should not be able to opt out.

The Equality Network's view is that it is unlikely that any religious body would wish to require a celebrant to conduct civil partnerships against the celebrant's will. We would be content for the legislation to make provision requiring the individual celebrant's agreement, before the celebrant is approved to solemnise same-sex marriages – this would implement the double lock referred to in our comments on question 15.

Question 17 (Paragraphs 3.29 to 3.33)

Which of the options do you favour to ensure that religious bodies and celebrants do not have to solemnise same sex marriage against their will?

Do you favour:

- Option 1
Option 2
Neither
Don't know

Please give reasons for your answer and if you have another option, please describe it.

Comments

Our view is that option 1 would in principle be more in line with the spirit of equality. It would mean that, in the specific law on approving celebrants, no distinction would be made between mixed-sex and same-sex marriage. However, it is quite clear that in practice a significant number of religious marriage celebrants, including for example all Catholic priests, will not be

solemnising same-sex marriages. In such circumstances, it does not seem unreasonable to operate a system of separate approvals for celebrants to solemnise mixed-sex and same-sex marriages.

Option 1 leaves the implementation of the rule discussed in question 15 above (preventing individual celebrants from acting contrary to the decision of their religious body) entirely to the internal discipline of religious bodies. We appreciate that some religious bodies may prefer the law to include procedures which reinforce the certainty that the religious body will not be required to solemnise same-sex marriages and will be able to prevent its celebrants from doing so. Option 2 would do that, and we would be content with that option.

See our answer to question 14 above for our views on the importance of the Equality Act 2010 and the European Convention on Human Rights in ensuring that religious bodies and celebrants cannot be challenged under equality law for refusing to solemnise same-sex marriages.

Question 18 (Paragraphs 3.34 to 3.39)

Religious bodies may not wish their premises to be used to solemnise same sex marriage. Do you agree that no legislative provision is required to ensure religious premises cannot be used against the wishes of the relevant religious body?

Yes
No
Don't know

Please give reasons for your answer

Comments

We feel that it may be difficult to legislate for every case, when there may be many different models for sharing of premises between different religious groups and with non-religious groups. We note that where a religious body uses, for example, a village hall for worship, and that hall is otherwise used mostly for non-religious purposes, the hall can already lawfully be used for civil partnership ceremonies conducted by the district registrar.

We therefore do not think that wholly new issues arise about the sharing of premises, if religious same-sex marriages are allowed. We would expect the bodies that share premises, including the owner of the premises, to reach agreement about the appropriate use of the premises for either civil or religious marriage ceremonies.

Question 19 (Paragraph 3.41)

If Scotland should introduce same-sex marriage, do you consider that civil partnerships should remain available?

- Yes
No
Don't know

Please give reasons for your answer

Comments

In our 2009/10 survey of 427 LGBT people, 85% of people thought that marriage should be opened up to same-sex couples. That 85% was divided into 32% who felt that, if that happened, civil partnership would no longer be needed, and 53% (an overall majority of survey respondents) who believed that civil partnership should be retained, and opened up to mixed-sex couples.

We also asked survey respondents, if marriage and civil partnership were both available, whether they might in future consider a civil partnership, a civil marriage, a religious marriage or a humanist marriage. 29% said they would consider a civil partnership, compared to 30% who would consider a civil marriage, 22% a religious marriage, and 22% a humanist marriage (some respondents chose more than one option). It is clear that there would be a significant minority demand from same-sex couples for civil partnership, even if same-sex marriage was available, and even though the legal effects of the two are almost identical.

This is because marriage and civil partnership are symbolically, socially and personally different, as we have noted in our comments on question 10 above.

In our five consultation meetings in November 2011, it was noted that some people would prefer civil partnership to marriage because, to some, marriage is perceived as too associated with religion, or as sexist or over-traditional.

The conclusion that there will be continuing demand for civil partnership is reinforced by experience from the Netherlands, where both same-sex marriage and registered partnership have been available since 2001. Registered partnership is, like civil partnership in the UK, almost identical in legal effects to marriage. Approximately one in four same-sex couples who register their relationship in the Netherlands choose registered partnership – the other three quarters choose marriage.

Because of this demand, and because we believe in maximising choice, we believe that civil partnership should be retained after the introduction of

same-sex marriage. Further advantages of retaining civil partnership are that the status of existing civil partnerships would be unchanged, and the recognition of overseas civil partnerships would continue. We are particularly concerned about the position of couples who have obtained a civil partnership (registered partnership, PACS, civil union, etc) in another country and are now living in Scotland. At the moment they are recognised as civil partners, with all the consequent rights and responsibilities. If civil partnership were abolished, they would lose those rights and responsibilities overnight.

Mixed-sex civil partnership

53% of our 427 LGBT survey respondents, and all the 150 participants in our five consultation meetings around the country in November 2011, agreed that if civil partnership is retained, it should be opened up to mixed-sex couples. This is also the view of the Equality Network, for the following reasons:

1. The principle of equality requires that the same choices be available to mixed-sex and same-sex couples, and more generally to couples regardless of their genders. The current restriction of civil partnership to same-sex couples only, discriminates against mixed-sex couples.
2. There is a demand for mixed-sex civil partnership. Although no detailed survey has been conducted, a number of people have personally commented to us that that would be their preferred legal relationship. Some mixed-sex couples consider that marriage has too many connotations that are patriarchal or sexist, or is too associated with religion. In the Netherlands, where mixed-sex marriage and mixed-sex registered partnership are both available, with almost identical legal effects, approximately 10% of mixed sex couples who register their relationship choose registered partnership; the other 90% choose marriage.
3. Civil partnership could be a popular alternative to cohabitation for mixed-sex couples who do not want to marry. Civil partnership would put their relationship on a much clearer and broader legal basis than cohabitation does.
4. The extension of civil partnership to cover mixed-sex couples would allow the recognition in Scotland of the status of mixed-sex couples who have registered a civil partnership (registered partnership, civil union, PACS, etc) in those countries providing such a thing to mixed-sex couples, including New Zealand, France, the Netherlands, etc. At the moment, the partnership of such couples is not recognised at all by Scots law, giving them no legal protection while living here. This is inequitable, because same-sex couples who have registered the same overseas partnership in the same country are recognised in Scotland as being civil partners, and have consequent rights and responsibilities under Scots law.

Question 20 (Paragraph 4.19)

Do you have any other comments?

Yes
No

We are particularly interested in your views on:

- potential implications of the proposals for transgender people (paragraph 3.42)
- possible transitional arrangements (paragraphs 3.43 and 3.44);
- recognition of Scottish same sex marriages elsewhere (paragraphs 3.45 to 3.49);
- any comments on forced marriage (paragraphs 3.51 and 3.52)
- any comments on sham marriage (paragraph 3.53)
- potential financial implications (paragraphs 4.01 to 4.08);
- potential equality implications (paragraphs 4.09 to 4.14).

Comments

Transgender people

The requirement to divorce, or dissolve one's civil partnership, in order to obtain gender recognition is a truly iniquitous aspect of the current law. It forces a transsexual person and their partner to decide between their marriage, which may have continued for decades, and their right to legal recognition of the transsexual person's true gender. It is the only case where the law reaches into a happy marriage which the partners want to continue, and forces them to divorce, on pain of having to continue to live with the wrong legal gender. While it is possible for the same couple to register a civil partnership after the divorce and gender recognition have been granted, rights may be lost in the conversion of a marriage to a civil partnership (for example pension rights) and the change from marriage to civil partnership is seen as a "downgrade" because of the different public, social and personal status of marriage and civil partnership.

Couples may therefore choose to remain married and forgo gender recognition. However, the consequences of living in one gender while legally being the other gender are severe and harmful, as was recognised by the European Court of Human Rights in the cases of Goodwin and I v. UK, which established the right to gender recognition.

The Equality Network is in contact with married couples in Scotland who have chosen to remain married rather than obtain the gender recognition for one partner which is their established ECHR right. Of course the introduction of same-sex marriage would enable gender recognition without divorce (because the only objection to granting gender recognition to a married person at present is that it would create a same-sex marriage). That would be of huge value to couples in this situation.

All of the 150 participants at our five consultation events in November 2011 recognised that this is a key issue of great importance, and supported the removal of the divorce requirement for gender recognition.

The Equality Network believes that the necessary amendments to the Gender Recognition Act are devolved and do not require any change to the procedures of the UK administered Gender Recognition Panel. The necessary change could be implemented by enabling sheriff courts to convert an interim gender recognition certificate into a full certificate, without requiring an application for (and granting) a divorce, so long as both spouses certify that they agree to this.

There has been at least one dissolution of civil partnership in Scotland on grounds of interim gender recognition (in 2009/10). We do not know whether the couple in that case would have preferred to remain civil partners if they could have obtained gender recognition without dissolution. However, for reasons set out above in our comments on question 19, we believe that civil partnership should be extended to mixed-sex couples, and in our view the requirement to dissolve a civil partnership to obtain gender recognition should also be abolished.

Transitional arrangements

In our 2009/10 survey of 427 LGBT people, 103 respondents were in a civil partnership. We asked them, if same sex marriage became available, and they could convert their civil partnership to a marriage without losing any rights, would they want to do so? 54% said yes and 42% said no (the rest did not respond to the question).

It is clear therefore that there is significant demand for a mechanism to make such a conversion. We have not consulted widely on what the conversion mechanism should be, but informally, some couples have said they would want it to be inexpensive, while others have indicated that they would like to convert via a full wedding ceremony. There are technical issues to be resolved, including what the effective start date of the marriage would be, and ensuring that the partnership property of the civil partnership is included in the matrimonial property of the marriage.

As noted above, our survey demonstrates that there is a large proportion (42%) of civil partners who would not want to convert their civil partnership to a marriage. The Equality Network would therefore oppose any arrangement of enforced conversion, or conversion by default.

We do not think that the mechanism to allow conversion of a civil partnership to a marriage should be only a transitional arrangement. If civil partnership is retained following the introduction of same-sex marriage (as we think it should be), then a conversion mechanism that would work in either direction (civil partnership to marriage; marriage to civil partnership)

should remain a permanent part of the law.

Cross border recognition within the UK

We note firstly that the UK Government has announced that it will consult, starting in March 2012, on the possible introduction of same-sex marriage in England and Wales. It is possible therefore that the UK Parliament may legislate to introduce same-sex marriage in England and Wales at much the same time as the Scottish Parliament does so for Scotland. Cross-border issues within Britain would then be relatively straightforward to resolve.

However, we would certainly not want the implementation of same-sex marriage in Scotland delayed if there are delays in England and Wales. Who can marry is a devolved issue, and the Scottish Parliament should decide on this issue in its own time. There is no reason why the law cannot differ in different parts of the UK. In Mexico, only one state, Mexico City, has introduced the solemnisation of same-sex marriages, but those marriages are recognised, and given effect to, throughout Mexico.

We note that the law on who may marry is already different in Scotland, compared to England and Wales. In England and Wales, a 16 or 17 year old requires their parents' consent to marry. In Scotland they do not. Nevertheless, a marriage solemnised in Scotland when one or both parties was under 18 and their parents did not consent, is recognised as valid in England and Wales. It can therefore be argued that a same-sex marriage solemnised in Scotland should be recognised as valid in England and Wales, without any change to the law there. However, to create certainty, the UK Government could potentially make statutory provision to that effect.

If the UK Government was not prepared to provide that Scottish same-sex marriages should be recognised as valid marriages in England and Wales, it is possible that a Scottish married same-sex couple might seek to obtain that recognition through court action in England or Wales.

As a much less satisfactory minimum, we would expect the UK Government to treat Scottish same-sex marriages in the same way that overseas same-sex marriages are already treated. Such marriages are treated within the UK as if they were civil partnerships. A small amendment (which would need to be made at Westminster) to the Civil Partnership Act 2004 could provide that the recognition of overseas same-sex marriages as civil partnerships in England and Wales is extended to Scottish same-sex marriages. We think that that amendment could be made by statutory instrument under the power in section 104 of the Scotland Act 1998.

We understand that recognition of Scottish same-sex marriages in Northern Ireland would be a matter for the Northern Ireland Executive and Assembly.

Reserved issues

Legislation of the Scottish Parliament for same-sex marriage will not directly provide for the reserved effects of marriage, including such things as inheritance tax, immigration rules and pensions regulation. However, the discussion above about cross-border issues applies here also. An argument can be made that the rules on who may marry are devolved, and that, so long as a marriage is validly solemnised under the law of Scotland, it should be recognised as a valid marriage for reserved purposes, without any change being needed to reserved law.

The UK Government could legislate to make that quite clear. As a much less satisfactory minimum, we would expect the UK Government to legislate so that Scottish same-sex marriages are treated the same as overseas same-sex marriages, for reserved purposes, that is, as civil partnerships.

Recognition outwith the UK

We understand that there is well-established international law on the inter-country recognition of marriages. We would expect that Scottish same-sex marriages would be recognised as marriages in all other countries that themselves allow the solemnisation of same-sex marriages. We understand that at least one other country, Israel, that does not allow the solemnisation of same-sex marriages, does recognise foreign same-sex marriages for at least some purposes.

It is very important that the Scottish same-sex marriage legislation ensures that foreign same-sex marriages are recognised in Scotland as marriages.

Forced marriages

We are not aware of a risk that forced same-sex marriages may happen. However, as a general point we believe that the legislation introducing same-sex marriage should not create differences between the law applying to same-sex and mixed-sex marriages. That could lead to real, although unintended, inequalities, and increases the chance of mistakes in legislation. We would therefore expect the law on forced marriages to carry across to same-sex marriages.

Sham marriages

The Equality Network has concerns about the way that immigration rules currently operate to place obstacles in the way of genuine marriages between non EU citizens and British citizens. As we understand it, the same rules that apply to sham marriages also apply to sham civil partnerships. We are not aware that sham civil partnerships are a problem in practice, and have no reason to expect a problem of sham same-sex marriages. However, as a general point we believe that the legislation introducing

same-sex marriage should not create differences between the law applying to same-sex and mixed-sex marriages. We would therefore expect the law on sham marriages to carry across to same-sex marriages.

Possible financial implications

It has been reported that the provision of same-sex marriage in the US state of Connecticut has boosted the economy of that state. At present we think that there are very few “tourist” civil partnership ceremonies in Scotland, because a Scottish civil partnership is of limited value to couples who live elsewhere. But because Scotland is such a popular destination for tourist marriages, it might also become popular for tourist same-sex marriages, which, in contrast to civil partnerships, will have better international recognition. That would be even more the case if Scotland introduced same-sex marriage before England and Wales – one would then expect significant numbers of same-sex couples from south of the border to visit Scotland to marry.

Equality

The Equality Network strongly endorses the analysis in paragraphs 4.10 to 4.13 of the consultation paper, that the proposals would further equality for LGBT people, and would increase the religious freedom of those religious groups which wish to solemnise same-sex marriages, without reducing the religious freedom of those religious groups which do not.

Other points

We consider it a crucial principle that the introduction of same-sex marriage is done as far as possible by extending the existing law of marriage to apply to married couples regardless of their genders. To introduce separate provisions applying to same-sex marriages, or to disapply existing marriage provisions in the case of same-sex marriage, where this is not strictly required, would be counter to the principle of equality. However well meant, it could lead to unintended inequalities of effect, and is more likely to lead to errors (such as the error which recently came to light in the legislation for simplified procedure dissolutions of civil partnerships).

We therefore think that the differences between civil partnership law and marriage law, listed in Annex B paragraph 5 of the consultation paper, should not be carried across to same-sex marriage. Mostly, this is already flagged up in that paragraph or will happen naturally. However this is perhaps less clear for the case of the use of proof of adultery to establish irretrievable breakdown of marriage. We see no reason why this should not apply also to same-sex marriage, notwithstanding the heterosexual definition of adultery.

However, there are still some rules relating to marriage which are gender-specific, that is, which apply differently to husbands and wives. We do not claim to be able to identify all of these, but some of them are as follows.

One is the difference in the start date from which public sector or contracted out pension contributions are included, when calculating the value of a survivor's pension for a widow (1978) or for a widower (1988). A decision will need to be taken about the date that applies for the two partners in a same-sex marriage. The date that applies for civil partnerships is 1988. This matter is reserved to Westminster.

Clearly there are differences between husbands and wives in the law on parenthood, and on fertility treatment (the latter is reserved to Westminster). However we suggest as a starting point that the legal regime that now exists for civil partnerships may be suitable for applying to same-sex marriages.

Other gender specific rules that we understand still exist are the rules that a wife is exempt from criminal liability for (a) resetting goods stolen by her husband, and (b) harbouring her husband as a fugitive from justice. It would seem sensible to disapply these rules for same-sex marriage since it is not clear to which partner they should fairly apply.

Clearly the detail of the forbidden degrees will be different for same-sex marriage – the necessary tables already exist in schedule 10 to the Civil Partnership Act 2004.

Finally, in our view, the rule that a marriage is voidable on grounds of permanent and incurable impotency, should not, because of the heterosexual definition of impotency, apply to a same-sex marriage.